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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-7

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO, *et al*,
Petitioners,

v.

WJLA, INC.,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether this Court should review a decision of a Court of Appeals upholding a finding of a Trial Court that a grievance is not arbitrable, where the collective bargaining agreement provides for arbitration only of disputes "arising under" the agreement and no provision in the agreement, express or implied, relates to the subject of the grievance.

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

WJLA, Inc., hereby replies to the petition for Writ of Certiorari of National Association of Broadcast Employees and Technicians, AFL-CIO, *et al*, seeking review of a judgment of The United States Court of Appeals for The District of Columbia in *WJLA, Inc. v. National Association of Broadcast Employees and Technicians, AFL-CIO* and *Local 31 of the National Association of Broadcast Employees and Technicians, No. 80-1305* (D.C. Cir. April 20, 1981).

COUNTERSTATEMENT OF THE CASE

For a third time Respondent finds itself before a court contesting Petitioners' attempt to force arbitration of a grievance that is clearly beyond the scope of the arbitration clause in the collective bargaining agreement between the parties. Petitioners' demand to arbitrate the instant dispute is a guise for extracting $14,000 from Respondent, that Respondent has no

obligation to pay. Any dispute over benefits payable to the widow of a former employee pursuant to an optional insurance coverage contracted for by the deceased employee, is not subject to compulsory arbitration because it does not "arise under" the collective bargaining agreement ("Agreement").

In proceedings below before the District Court, Petitioners and Respondent entered into a stipulation governing all facts before the court. Among other things, the parties stipulated that no provision in the current Agreement, or in any previous agreement, relates directly or indirectly to life insurance benefits. The parties also stipulated that the insurance coverage in question has been maintained without change by Respondent at all times pertinent to this dispute. Nothing in the Agreement nor in the stipulation may be interpreted even to suggest that Respondent ever intended to guarantee the benefits provided under the optional insurance coverage at issue here.

Petitioner has failed to identify any obligation of Respondent subject to arbitration. The parties negotiated and agreed to the contract provision restricting arbitrable disputes to those "arising under" the Agreement. Since the Agreement is silent in the issue of life insurance benefits, the arising under prerequisite to arbitration has not been met. Nor does the record support any alleged theory that some "past practice" on the part of Respondent gave rise to an implied contractual obligation to guarantee such benefits.

Faced with a record devoid of support for their position, Petitioners seek to go beyond the stipulation signed and agreed to below—as they did before the Court of Appeals—by raising a new and specious argument based on section 6.10 of the Agreement, which relates to insurance coverage from the risk of accidental death or injury. Dispite admitting to the Court of Appeals that they failed to raise section 6.10 before the District Court, Petitioners seek once again to inject this unrelated contract provision into the case.

The District Court properly interpreted its role to determine whether the parties had agreed to submit this dispute to the arbitrator and, moreover, properly concluded that they had not. The Court of Appeals affirmed without opinion. These

decisions were consistent in all respects with the facts and the law. Petitioner has failed to assert any ground to justify further review by this Court of the decisions of the Courts below.

ARGUMENT

THE ARBITRABILITY OF A DISPUTE IS TO BE DETERMINED BY THE COURT UNLESS OTHERWISE SPECIFIED BY THE CONTRACTING PARTIES

The duty to arbitrate a labor dispute does not arise by operation of law; only if a party has contracted to submit his grievance to arbitration will he be required to do so. *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 374 (1974); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241 (1962); *United Steel Workers v. Warrior Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). As the Court stated in *Warrior & Gulf:*

> "Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose."

363 U.S. at 583, n. 7. Petitioners have failed to show that the parties—either by express agreement or by past practice—ever intended that an arbitrator should determine questions of arbitrability.

Perhaps in recognition of this failure, Petitioners have developed their own theory of the role of the judiciary in deciding questions of arbitrability, contending that a court must yield to an arbitrator on this issue when the arbitration clause "is only as broad as the collective bargaining agreement itself" and some alleged past practice of the employer may bear on the substance of the grievance. Petitioners further assert that a court may not interpret the contract by conducting evidentiary hearings, because such hearings are the sole province of the arbitrator.

Such a theory ignores the precedent of this Court. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 571-72 (1960) (Brennan, J., concurring opinion.). If upheld, the theory would prevent courts ever from asserting jurisdiction over questions of arbitrability. In essence, these proposed judicial strictures commit any allegation of violation of a collective bargaining agreement to the authority of an arbitrator regardless of the scope of the mutually agreed upon arbitration clause. Such a theory obviously contradicts this Court's prior statement that ". . . the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary." *Steelworkers, supra,* 363 U.S. at 571.

Despite Petitioners' allegations that questions of arbitrability and the substance of the dispute are inextricable, nothing in the record below nor in the petition to this Court satisfies the Court's clear demand for explicit proof that the parties have delegated questions of arbitrability to the arbitrator. Thus, the courts below did not err in considering and deciding the same questions in Respondents' favor.

THE GRIEVANCE AT ISSUE DID NOT ARISE UNDER THE COLLECTIVE BARGAINING AGREEMENT AND, THEREFORE, CANNOT BE SUBJECT TO ARBITRATION

The grievance at issue asserts that Respondent must pay $14,000 to the beneficiaries of a deceased employee who was a member of Petitioners' local union. The alleged basis for the grievance is a contract of insurance between a deceased employee and an insurance company (which is not a party to the collective bargaining agreement). The parties stipulated that neither the present Agreement nor any previous agreements between the parties contained any provisions referring, directly or indirectly, to life insurance benefits. The premiums for the life insurance in question were paid by the employee to the insurer through payroll deductions. When the insurance company declined to pay an amount to the deceased's beneficiary that Petitioners apparently believed was owing under the optional policy, Petitioners demanded a like amount from the company.

Disputes over payment of insurance benefits are subject to arbitration only when a bona fide argument can be made that the controversy involves a substantial issue of the employer's contractual obligations to provide insurance that necessitates interpretation of the contract. *Louisville Cooperage Co.*, 63 Lab. Arb. 165, 168 (1974) (Volz, Arb.). *See also Dravo Corp.*, 67 Lab. Arb. 264, 266 (1976) (LeWinter, Arb.); *Stewart-Warner Corp.*, 54 Lab. Arb. 951 (1970) (Larkin, Arb.). Since the parties have stipulated that the Agreement is silent on the question of life insurance, unquestionably the Agreement on its face does not encompass the grievance.

Nor can any suggested obligation arising from Respondent's past practice sufficiently broaden or supplement the Agreement to include this grievance. There has been no allegation of any change or failure to provide insurance coverage. Petitioners question only payment of benefits claimed under the optional insurance policy between a former employee and the insurer. As the parties stipulated, Respondent has continued to provide both group term life insurance and the option to elect to purchase additional coverage from the insurer. Thereby, Respondent has fulfilled any implied obligation it may have by virtue of past practice.

Moreover, the record contains no evidence of any past practice that satisfies the rigorous criteria of *Airline Pilots Association, International,* 67 Lab. Arb. 217 (1976) (Ordman, Arb.): "[P]ast practice can be deemed binding absent specific contractual language, where it is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as fixed and established practice accepted by both parties." *Id.* at 222. The courts below recognized that Petitioners' past practice argument met none of these standards. On petition to this Court, Petitioners have failed to assert any further argument warranting a contrary conclusion.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO SATISFY THE STANDARDS SET FORTH IN RULE 17 OF THIS COURT

In rejecting Petitioners' argument below that arbitrability must be determined by the arbitrator, the District Court stated:

> "The court does not agree with this argument because the 'presumption' in the labor law favoring arbitration is not irrebuttable, nor is it open ended, allowing grievances to be filed over disputes not within the parties' agreement to arbitrate. *See Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); THE DEVELOPING LABOR LAW 482 (C.J. Morris ed. 1971)."

WJLA, Inc. v. National Association of Broadcast Employees and Technicians, AFL-CIO, et al, No. 79-3132 (D.D.C. Feb. 12, 1980). Petitioners have failed to show that the District Court, or the Court of Appeals in upholding the District Court, either decided an important question of federal law that has not been but should be settled by this Court, or decided a federal question in a way that conflicts with applicable decisions of this court. To the contrary, as Respondent has shown, the position urged by Petitioners, if adopted, would be contrary to long-standing precedent placing determinations of arbitrability squarely within the jurisdiction of the courts.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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